IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 60 OF 2007
IN
INSOLVENCY PETITION NO. 08 OF 1994

RE : SHARAD RAMCHAND KHANNA .. DEBTOR

EX-PARTE :

The Industrial Credit & Investment Corporation of India Ltd., .. Petitioning Creditor.

AND

Kotak Mahindra Bank Ltd., .. Assignee.

AND

NOTICE OF MOTION NO. 61 OF 2007
IN
INSOLVENCY PETITION NO. 09 OF 1994

RE : SUMESH RAMCHAND KHANNA .. DEBTOR

EX-PARTE :

The Industrial Credit & Investment Corporation of India Ltd., .. Petitioning Creditor.

AND

Kotak Mahindra Bank Ltd., .. Assignee.

Mr.Aspi Chinoy, Sr.Counsel with Mr.Navroze Seervai and Kishore Jain i/by M/s.Mehta & Girdharlal Advocates for the Debtors.

Mr. J.P.Sen with Mr.Gaurang R.Mehta Advocate for Assignee of Petitioning Creditor.

Mr. Y.C.Parikh, Official Assignee- present.

CORAM : A. S. OKA, J.

DATED : 19th OCTOBER, 2007.

P.C. :-

. The submissions of the learned counsel appearing for the parties were heard on 16th of October, 2007. With a view to appreciate the submissions which are advanced by the learned counsel for parties, it will be necessary to refer to the facts of the case in brief.

2. The Debtors have taken out the Notice of Motion Nos. 60 of 2007 and 61 of 2007. The petitioning creditors had taken out Insolvency Notice under section 9(2) of the Presidency Towns Insolvency Act, 1909 (hereinafter referred to as the said Act of 1909).

3. The Insolvency Notice was taken out on the basis of a decree passed in Summary Suit No. 1935 of 1989 against Shri Sharad R. Khanna (Debtor in Insolvency Petition No.8/1994) and Shri Sumesh R. Khanna (Debtor in Insolvency Petition No.9/1994), who were the guarantors of the company by the name M/s. Krimpex Synthetics Ltd.. Notice of Motions were taken out for setting aside the insolvency notice taken out against both the debtors. The said notice of motions were

dismissed on 4th of August, 1993 and the orders passed in the said notice of motions have been confirmed in Appeal by a division bench of this court as well as by the Apex Court.

4. On 30th of March, 2001 a separate suit being suit No. 1935 of 1989 filed by the petitioning creditors against the Company i.e. Krimpex Synthetics Ltd., was transferred to the Debt Recovery Tribunal. The suit was numbered as Original Application No.156 of 2001 and a decree was passed by the Debt Recovery Tribunal in terms of the consent terms filed by the parties. Under the consent terms, the defendant No.1 therein -Krimpex Synthetics Ltd., submitted to a money decree in favour of the petitioning creditors i.e. The Industrial Credit & Investment Corporation of India Ltd. (for short ICICI) as well as in favour of the Industrial Finance Corporation of India Ltd. (for short IFCI). The said company agreed to pay interest at the rate of 12.5% per annum. Under the said consent terms, the debtors agreed to pay a sum of Rs. 1,60,00,000/- with interest to the ICICI. The schedule for payment of the sum of Rs. 1,60,00,000/- was incorporated in the consent terms. By a supplementary consent terms dated 3rd of August, 2001, the earlier consent decree was modified and time for payment of the amount under the

earlier consent decree was extended. It was provided in the consent terms that in the event the company Krimpex Synthetics Ltd. fails to pay any or all of the instalments within the time period as stated hereinabove, the decree shall become executable forthwith and insolvency petitions No. 8 of 1994 and 9 of 1994 as well as insolvency petitions No. 11 and 12 of 1994 pending in this court shall be made absolute by consent of the parties without any demur from the debtors. The Minutes of Order were filed in this court in the aforesaid insolvency petitions in which the aforesaid agreement between the parties was recorded. In the said minutes of the order, the debtors agreed that in the event of the amount agreed to be paid by Krimpex Synthetics Ltd., and the debtors is not paid in a stipulated time, the insolvency petitions shall be made absolute as against the debtors and the undertaking of the debtors was also incorporated therein that in such event they shall not oppose the insolvency petitions and the order of adjudication being passed against them.

5. The debtors herein filed Notice of Motion No.66 of 2002 in Insolvency Petition No.8/1994 and Notice of Motion No. 68 of 2002 in Insolvency Petition No.9/1994 for setting aside the aforesaid order passed in terms of

the Minutes of the Order. Similarly, Notice of motions were taken out by the debtors in the other two insolvency petitions with which I am not concerned. By the judgment and order dated 16th of July, 2002, this court dismissed the said Notice of Motions. On the same day, a separate order was passed in Petition Nos.8 and 9 of 1994 for adjudication. This court in the said separate order directed that in the event the debtors fail to pay the amount under the consent decree dated 30th March, 2001 as modified on 6th of August, 2001 on or before the 16th of January, 2003 they shall stand adjudged Insolvents without any further reference to the Court.

6. The debtors in both the insolvency petitions preferred separate appeals for challenging the aforesaid order dated 16th July, 2007. In the said appeals preferred by the debtors, an ad-interim order was passed by the division bench of this court in favour of the debtors. By the judgment and order dated 3rd of April, 2003 the said appeals preferred by the debtors were dismissed by a division bench of this court. However, the division bench continued the interim relief which was earlier granted for a period of six weeks.

7. It is not in dispute that the order passed by

the division bench dismissing the aforesaid appeals has attained finality. An application was made by the petitioning creditors and IFCI in the Mumbai Debt Recovery Tribunal-I being Application No. 36/2003 for amendment of the recovery certificate. Earlier, the recovery certificate was issued in terms of the consent decree. The prayer in the said application was that the recovery certificate be amended as in view of the default committed by the said company, the entire decretal amount became payable by the company. It appears that on 29th September, 2003 the consent terms were filed in the said Misc. Application 36/2003, which had a result of modifying the earlier consent terms dated 30th of March, 2001. The said consent terms record that a sum of Rs. 71,00,000/- has been paid out of sum of Rs. 1,60,00,000/-. The consent terms provided that the balance amount of Rs.89/-lacs was to be paid by issuing post dated cheques by 31st of March, 2003 and by sale of the land and buildings by 31st March, 2004. The consent terms further provided that till 7th of April, 2004, the petitioning creditors and IFCI would consent for continuing the stay granted by the division bench of this court and would not proceed with the Misc.Application No. 36 of 2003. Further agreement was recorded in the consent terms that if the balance amount of Rs.89/- lakhs was paid within the time

schedule provided in the consent terms, the recovery certificate would be marked fully satisfied and the Misc.Application No. 36/2003 would stand dismissed. The consent terms also provided that in such contingency, the decree passed by this court against the debtors herein would be automatically marked as fully satisfied and the petitioning creditors as well as IFCI will give consent for setting aside the orders of adjudication passed against the debtors. Lastly, it was provided that if the balance amount was not paid within stipulated time, the amounts paid earlier would stand appropriated towards the total decretal amount and the applicants would be entitled to an order in Misc. Application No. 36/2003.

8. On 30th September, 2003 in the disposed of Appeals, a division bench of this court by consent of the parties extended the stay granted earlier till 31st March, 2004. In the meanwhile, the petitioning creditors executed a deed of assignment on 29th September, 2004 in favour of Kotak Mahindra Bank Ltd. in respect of its share of Rs.100/- lakhs in the total amount of Rs. 165 lakhs. Even after the time stipulated for payment of balance amount of Rs.89 lakhs in the order dated 29th of March, 2003 expired, the said company continued to make further payments. On 14th

February, 2005 by consent of the parties, the division bench extended the order of stay granted earlier. On 12th of May, 2005 a supplementary deed of assignment was executed by the petitioning creditors in favour of the Kotak Mahindra Bank Ltd.. It was clarified that even the right, title and interest of the petitioning creditor under the recovery certificate of the Debt Recovery Tribunal was assigned in favour of the Kotak Mahindra Bank Ltd.. According to the case of the debtors, by 4th of July, 2006 a sum of Rs. 157 lakhs was paid to IFCI and ICICI Bank, the petitioning creditors and Kotak Mahindra Bank Ltd.. It is stated that in suit No. 1595 of 1989, a sum of Rs.23.66 lakhs was deposited. Therefore, according to the case of the debtors, a total amount of Rs.180/- lakhs was paid which is available to the petitioning creditors and the IFCI. It is stated that the sum of Rs.23.66 lakhs deposited in suit No. 1595 of 1989 has been transferred by this court to the Recovery Officer of the Debt Recovery Tribunal-III.

9. An application was filed on 1st of November, 2006 by Kotak Mahindra Bank Ltd. being Misc. Application No. 107 of 2006, seeking rectification of the recovery certificate by contending that the same ought to have been issued for the entire decretal amount

in view of the fact that the amount as agreed under the consent terms was not paid by the said company and/ or by the debtors within the time schedule provided therein. Another application being Application No.88 of 2007 was filed by IFCI for a similar relief of rectification of the recovery certificate.

10. In the meanwhile, the notice of motion taken out in the disposed of appeals came up before the division bench of this court on 28th June, 2007. The division bench passed an order by extending the ad-interim order passed in the appeal as a last chance till 21st of July, 2007. The division bench directed that the said order shall stand automatically vacated thereafter or on disposal of the applications which have been made before the insolvency court, whichever is earlier. The reference to the applications in the order by the division bench to the notice of motion Nos.60 of 2007 and 61 of 2007. The ad-interim relief has been extended by this court from time to time.

11. During the course of his submissions, the learned senior counsel appearing for the debtors in support of the notice of motion pointed out that an application made before the Recovery Officer of the Debt Recovery Tribunal for recording of satisfaction of the

earlier recovery certificate has been allowed and the recovery certificate has been marked as satisfied. Today. before I started dictating this order, it was brought to my notice that the said order passed by the Recovery Officer has been stayed on 16th of October, 2007 itself and a xerox copy of the certified copy of the said order of stay has been tendered on the record.

12. The prayers made in the Notice of Motions is that the order of adjudication dated 16th July, 2002 passed by this court be reviewed, varied, rescinded, recalled and/ or set aside. In the alternative, a prayer is made for annulling of the order of adjudication by exercising powers under section 21 of the said Act, 1909.

13. The learned counsel appearing for the debtors in support of the notice of motion submitted that by the first prayer made therein, the debtor has invoked the powers of the Insolvency Court under subsection 1 of section 8 of the Act of 1909. He invited my attention to the consent terms dated 30th of March, 2001 as well as the supplementary consent terms filed on 3rd of August, 2001. He has also pointed out the stipulation in the consent terms dated 29th September, 2003 filed in the Misc.Application No.36 of 2003 which according to

him has the effect of the modifying the original consent terms filed on 30th March, 2001. He submitted that even after the time provided in the consent terms dated 29th September, 2003 for making balance payment expired, various amounts were accepted by the petitioning creditors. He submitted that acting upon the consent terms dated 29th September, 2003, the division bench by order dated 30th September, 2003 extended the stay till 31st March, 2004. Under the said consent terms dated 29th September, 2003 filed before the Debt Recovery Tribunal, the time for payment of the amount by the said company and the debtors was extended till 31st March, 2004. He pointed out that not only that after expiry of the period provided in the consent terms dated 30th September, 2003 the payments were accepted but the stay granted by the division bench to the order of adjudication was extended by consent of the parties. He pointed out that on 14th February, 2005, the division bench by consent, adjourned the matters to 20th June, 2005 and continued the ad-interim order granted earlier till further orders. He submitted that the conduct of the petitioning creditors and the holders of the recovery certificate issued by the Debt Recovery Tribunal shows that they agreed to extend the time fixed under the consent terms dated 29th September, 2003 for making payment of the balance amount of Rs.89,00,000/-.

He submitted that even if the sum of Rs.23.66 lakhs deposited in the suit No. 1595 of 1989 was excluded, the petitioning creditors/ M/s.Kotak Mahindra Bank Ltd., have received an aggregate amount of Rs.157 lakhs. He pointed out that even in the application dated 1st February, 2006 filed by the assignee/petitioning creditors before the Debt Recovery Tribunal, it is admitted that an aggregate amount of Rs.150.40/-lakhs has been received. He submitted that in view of the substantial payments made to the petitioning creditors and/or to the assignees/IFCI, a case is made out for exercising powers under subsection 1 of Section 8 of the said Act of 1909. He invited my attention to the decision of the apex court in the **State of Bank of India vs. Vijay Kumar AIR 2007 S.C. 1689** and submitted that conduct of the parties indicate that there was no failure of settlement between the parties. He submitted that the apex court in the case of **Paramjeet Singh Patheja vs. ICDS Ltd., reported in JT 2006 (10) SC 41** examined the provisions of the said Act of 1909 and considered the drastic effect of the order of adjudication by observing that the statute has laid down grave consequences of civil death for a person sought to be adjudicated as insolvent and therefore, the said Act of 1909 has to be construed strictly. He submitted that as a payment of sum of Rs.180 lakhs has been already

made, the drastic consequence of the order of adjudication cannot be allowed to continue and therefore, it is a fit case for exercising the jurisdiction under subsection 1 of section 8 of the said Act of 1909.

14. The learned counsel for the assignee of the petitioning creditors has relied upon various orders passed by this court earlier and submitted that the order dated 16th July, 2002 has now attained finality. He submitted that the consent order passed by the Debt Recovery Tribunal on 29th September, 2003 is a self operative order which is not modified subsequently. He submitted that the order passed by the recovery officer recording satisfaction of the recovery certificate is of no consequence as what has been recorded is the satisfaction of the recovery certificate issued on the basis of the consent order. He submitted that in view of the failure of the company and the debtors to comply with the said consent order now the entire amount under the decree has become payable and in fact an application for rectification of the recovery certificate is pending.

15. I have carefully considered the submissions. It will be necessary to refer to the order dated 17th

April, 2001 passed in Insolvency Petition Nos. 08 and 09 of 1994 in terms of the agreed Minutes of Order filed by the parties. The said order has been passed on the basis of the decree passed by the Debt Recovery Tribunal on 30th of March, 2001 in terms of the consent terms. Clause No.6 of the said Minutes of order filed in Insolvency Petitions Nos.08 and 09 of 1994 reads thus :

> "6) Ordered and declared and the Judgement Debtor confirms that in the event the said Krimpex Synthetics Ltd. and the Judgement Debtor fails to pay to the Petitioning Creditors, the said entire amount of Rs. 1,60,00,000/- on or before 31st May, 2001, or such further period as may be agreed to by the Petitioning Creditor entirely at its own discretion, in writing, this Insolvency Petition pending shall be made absolute against the Judgement Debtor. In such event, the Judgement Debtor hereby undertakes to this Hon'ble Court that he shall not oppose the Insolvency Petition and the order of adjudication being passed against him."

Thereafter on 3rd of August, 2001 further consent terms filed by the said Company on one hand and the Petitioning Creditor and IFCI on the other hand. The said consent terms modified the schedule of payment to be made by the said company. However, consequences of failure to pay the amount by the company provided in the consent terms dated 30th March, 2001 were maintained. Thereafter, notice of motions No. 67 of 2002 and 68 of 2002 were taken out by the debtors for setting aside the order dated 17th of April, 2007 passed by the insolvency

Court and in particular clause 6, which is referred to earlier. By a detailed judgment and order dated 16th July, 2002 this court dismissed the said notice of motions taken out by the debtors. Perusal of the said order shows that the effect of the consent orders passed by the Debt Recovery Tribunal was considered by this court. In paragraph 11 of the said order, the learned Judge has recorded the following submission of the learned counsel for the debtors :

> "11. Mr.Makhija, learned counsel for the Debtors as stated earlier admitted that there has been a default in payment of the instalments of Rs.29 lakhs with interest due on 23rd October,2001 in terms of the consent terms and the next instalment of Rs.80 lakhs with interest which was payable on 23rd November, 2001. He also admitted that the factory was kept open by the Receiver during the period 24th September, 2001 till 3rd December, 2001."

16. In paragraph No.13 of the said order, the learned Judge noted the submissions made by the debtors by invoking section 13(4)(b) of the said Act of 1909 by contending that an order of adjudication of the debtors as insolvents should not follow as a matter of course. The said submission was considered and rejected by this court. On the same day, this court passed a conditional order in both the insolvency petitions by providing that if the debtors fail to pay the amount payable under the consent decree passed by the Debt Recovery Tribunal on

or before 16th January, 2003 they shall stand adjudicated as insolvents without any further reference to the court. The appeals preferred by the debtors for challenging the orders passed by this court on 16th July, 2002 were admitted by this court. However by judgment and order dated 3rd April, 2003 the said appeals were dismissed on merits. The division bench observed that mere excuses have been given by the debtors for their failure to pay the amounts. It is an admitted position that a special leave petition preferred by the debtors against the order of the division bench has been withdrawn by order dated 28th September,2004.

17. Now reliance has been placed on the consent terms filed on 29th September, 2003 before the Tribunal. Clause Nos 8 and 9 of the said consent terms read thus :

> "8. The Applicants agree that until the entire payment of the balance concessional amount is not received and/or until the expiry of the maximum grace period granted herein of 31st March, 2004 to make the said payment the Applicant shall :-
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> (i) Grant their no objection for stay of the order of insolvency of the Hon'ble Lordships Mr. Justice A.P.Shah and Justice Mr.D.K.Deshmukh dated 1st April, 2003 of the High Court of Bombay, in Appeal Nos. 881, 882,883 and 884 of 2002 and Appeal Nos. 204, 205, 206 and 207 of 2003 upto 7th April, 2004.
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> (ii) Not proceed with the hearing and final

disposal of Miscellaneous Application No.36 of 2003 filed by the Applicants in the Hon'ble Debt Recovery Tribunal-I upto 7th April,2004.

9. On receipt of the entire concessional amount of Rs.160/-lacs in the manner set out hereinabove,the Applicants shall unconditionally hereby agree and undertake to :-

(i) that the Recovery Certificate dated 20th April, 2001 issued by the Hon'ble Debt Recovery Tribunal for a sum of Rs.160/- lakhs shall be marked fully satisfied.

(ii) that the Miscellaneous Application No.36 of 2003 filed by the Applicants in the Hon'ble Debt Recovery Tribunal No.1 shall stand dismissed for want of prosecution.

(iii) that the decree dated 5th November, 1990 passed by the Hon'ble High Court of Bombay in Suit No. 1935 of 1989 against Mr. Sharad Khanna and Mr. Sumesh Khanna shall automatically be marked as fully satisfied.

(iv) that they shall unconditionally withdraw the Insolvency proceedings and/or by consent get the order of Insolvency passed by the Hon'ble High Court against Mr. Sharad Khanna & Mr. Sumesh Khanna unconditionally set aside."

18. Clause No.10 of the consent terms provide for the consequences of the non-complaince by the said company. The said clause No.10 reads thus :

"10. And lastly this Hon'ble Tribunal with consent of parties hereby orders and decrees that in the event Defendant No.1 fails to make payment of any one instalment of any sum under the concessional amount payable to the Applicants within the extended time period stated hereinabove, then in that case :-

a) All sums received by the Applicants hereunder shall stand appropriated towards the decreetal sum as set out in clause 1 of the

> Consent Terms dated 30th March, 2001 and thereafter the rest of the consequences as prescribed in the Consent Terms dated 30th March, 2001 and 3rd August, 2001 shall follow and further the Applicants shall be entitled to on application orders as prayed for in Miscellaneous Application No. 36 of 2003 pending in the Hon'ble Debt Recovery Tribunal No. 1 by consent of the parties and the Applicant will be entitled to execute the said decree and /or Recovery Certificate against Defendant No.1 and further that the aforesaid is without prejudice to the Applicants rights to take such proceedings as they may be entitled to for dishonour of the cheque/s issued to the Applicants as aforesaid and for the balance amount due and payable under the Recovery Certificate issued by this Hon'ble Tribunal pursuant to the order of the Hon'ble Tribunal in Miscellaneous Application No. 36 of 2003;
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> b) and further the Special Leave Petition No.9635 of 2003 filed by Mr. Sharad Khanna in the Hon'ble Supreme Court of India shall stand dismissed with no order as to costs for want of prosecution.".

19. It is an admitted position that the compliance has not been made with the consent order dated 29th September, 2003 passed by the Debt Recovery Tribunal by paying necessary amount within the time stipulated therein.

20. It must be noted here that the order of adjudication passed on 16th July, 2002 has attained finality as appeals preferred before the division bench of this court were dismissed on merits and the special leave petition filed by the debtor in Insolvency Petition No. 08 of 1994 has been withdrawn.

Admittedly, there is a default in compliance with the consent order dated 29th September, 2003. The said consent order continues to operate and the same has not been modified till today. The effect of the consent orders passed on 30th March, 2001 and 29th September, 2002 is that if the concessional amount is not paid by the said company or the debtors herein within the time schedule provided, then the entire amount under the decree becomes payable. Therefore, merely because certain amounts were accepted after the expiry of the period provided in the consent order dated 29th September, 2003, one cannot come the conclusion that the judgment debtors or their assignee agreed for an extension of time. The order passed by the recovery officer of the Debt Recovery Tribunal marking the recovery certificate as satisfied has no relevance, as the recovery certificate was issued on the basis of the consent order of the Debt Recovery Tribunal which provided for payment of concessional amount as mentioned in the consent order. The order of the Recovery Officer will not wipe out the effect of the various clauses in the consent orders passed by the Debt Recovery Tribunal.

21. The learned senior counsel appearing for the debtors has relied on the decision of the Apex Court in the case of the State Bank of India. This is a case

where the Debt Recovery Tribunal passed a decree in favour of the bank which was subsequently modified in view of a compromise arrived at between the bank and the borrower. There was default committed by the borrower in payment of instalments provided in the consent order. However, the bank went on accepting the payments from the borrowers. Reliance has been placed on paragraph 9 of the said settlement which reads thus :

> "9. It is noted that Bank at no point of time before the final payment was made appear to have indicated that settlement failed because of failure to stick to the time schedule."

. The said decision will have no application to the facts of the present case and specially in view of the order dated 16th July, 2002 passed by this court which has attained finality. The effect of the said order is that the Insolvency Petitions have been made absolute. The last consent order of the Debt Recovery Tribunal has not been modified. Therefore, the subsequent acceptance of payments by the petitioning creditors/ their assignees will not affect the order passed in Insolvency Petitions. The extension of ad-interim order by consent of the parties by the division bench after the dismissal of Appeal has no legal effect on order dated 16th July, 2002.

22. This is not a fit case for exercising powers under subsection 1 of section 8 of the said Act, 1909. As the entire amount payable under the decree of this court passed against the debtors has not been paid, obviously the powers under section 21 of the said Act of 1909 cannot be exercised. Hence, the Notice of Motion Nos. 60 of 2007 and 61 of 2007 are hereby dismissed.

23. At the prayer made by the learned counsel appearing for the debtors, the ad-interim order passed by this court is extended for a period of six weeks from today.

(A.S.OKA,J.)

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